a categorical taking of the accrued interest – not just an interference with its use – and no amount of public purpose can justify the absence of compensation.

Indeed, the crux of this Petition is that the California Court of Appeal in this case erroneously decided that this Court's decisions in *Phillips* and *Brown* overruled the legal underpinnings of *Fresno Firefighters*. *See Overland*, 126 Cal. App. 4th at 138-140 (2005). Therefore, reliance on *Fresno Firefighters* begs the question.

D. The Taking in This Case is Not a Regulatory Taking.

The County Respondents also attempt to justify their position by the untenable argument that the confiscation of interest in this case is a mere "regulatory" taking. Opposition at 10-11. But the regulatory taking analysis is inapplicable. Taking the interest actually earned is not a mere interference with the owner's beneficial use of the principal, as urged by Respondent County, but rather the *per se* physical taking of the owner's property. *Phillips*, 524 U.S. at 172. The balancing of public and private interests to avoid a taking is inappropriate under a *per se* analysis. Under *Brown*, the *per se* approach is mandated because private property – the accrued interest – was unilaterally taken by the government for public use.

E. Petitioners are Owed Just Compensation.

The County Respondents also assert that no compensation is owed to Petitioners because they failed to avail themselves of statutory bail alternatives that would have avoided the unlawful Taking by the government.

But whatever other statutory alternatives exist, Petitioners have suffered a pecuniary loss by posting cash bail, as the California statutory scheme clearly allows, and losing the actual interest.

In any event, it is premature to speculate about whether Petitioners will eventually prove any actual damage as a result of the taking of their interest. None of the courts below reached that issue; all of them focused on the threshold question of whether private property was taken. If as Petitioners' suggest, the Court of Appeal wrongly decided this threshold issue, the matter should be remanded to the California courts for a determination, at trial, of the amount of compensation, if any, is due.

CONCLUSION

The County Respondents' late-stated standing argument is based on unsupported facts and should not dissuade this Court from granting certiorari on a vitally important Fifth Amendment question with widespread ramifications. This Court has repeatedly stated that interest earned on principal is the private property of the depositor. A State's appropriation of the interest actually earned on the temporary deposit of the principal for a public purpose is a *per se* confiscation that requires the trial court to determine what compensation, if any, is due. The California Court of Appeal's implied contract analysis transforms private property into public property by judicial fiat which is no more appropriate than if the legislature performed the same trick. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

OVERLAND BORENSTEIN
SCHEPER & KIM LLP
MARK A. BORENSTEIN

MARK A. BORENSTEIN
*Attorneys for Petitioners
Mark E. Overland; Pamela
Poloski; and Overland &
Borenstein LLP*